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No. 95-1562

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1995

EARL J. PARKER, JR.
and GLENN C. REDMOND,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; UNITED STATES DEPARTMENT OF LABOR
and
FARRELL LINES, INC.; ROYAL INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U. S. Court of Appeals for the Fourth Circuit err in finding that a location is not a maritime situs as defined in the Longshore and Harborworkers Compensation Act, 33 U.S.C. § 903(a) when the location is neither contiguous with navigable waters nor touches such waters, and is not within the boundary of a shipping terminal?

PARTIES TO THE PROCEEDING

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[1] The Director, Office of Workers' Compensation Programs was dismissed as a party respondent by the Court of Appeals for the Fourth Circuit. The Director was subsequently allowed to intervene on the side of the Petitioners. The Director is shown as a Respondent in the Petition for Writ for *Certiorari* only because of the requirements of the Rules of the Supreme Court, Rule 12.6. Respondents, Farrell Lines, Inc. and Royal Insurance Co., assert that the Director is not a proper party to these proceedings, based on this Honorable Court's decision in Director, OWCP v. Newport News Shipbuilding & Drydock Co., 115 S. Ct. 1278 (1995).

PARTIES TO THE PROCEEDING (cont.)

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[2] These parties have no parent or subsidiary corporate affiliations.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

BRIEF IN OPPOSITION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS TO DENY THE WRIT 7

I. The Fourth Circuit Court of Appeals decision that the Petitioners were not injured on a maritime situs is consistent with the guidance provided by this Honorable Court and is not, as Petitioners assert, in direct conflict with other circuits or prior decisions of the Fourth Circuit 7

II. Assuming, *arguendo*, that a direct conflict does exist between the circuits and that a "functional" test is pronounced by the Court, Petitioners' injuries still did not occur on a maritime situs 18

III. There is no compelling reason to grant the writ 20

CONCLUSION 21

TABLE OF AUTHORITIES

Beecham v. United States,
114 S. Ct. 1669 (1994)
. 11

Brady-Hamilton Stevedore Co. v. Herron,
568 F.2d 137 (9th Cir. 1978)
. . . . . 5, 7, 12, 13, 14, 15, 19

Brown v. Bath Iron Works Corp.,
22 BRBS 384 (4th Cir. 1989)
. 19

Davis v. Doran Co. of California,
20 BRBS 121 (1987), *aff'd mem.*,
865 F.2d 1257 (4th Cir. 1989)
. 19

Director, OWCP v. Newport News Shipbuilding & Drydock Co.,
115 S. Ct. 1278 (1995)
. ii

Director, OWCP v. Perini North River Associates,
459 U.S. 297 (1983)
. 11

Dole v. Steelworkers,
494 U.S. 26 (1990)
. 11

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) (citing Demarest
v. Manspeaker, 498 U.S. 184 (1991))
. 8

Herb's Welding, Inc. v. Gray,
470 U.S. 414 (1985)
. 12

Humphries v. Director, OWCP,
834 F.2d 372 (4th Cir. 1987),
cert. denied, 485 U.S. 1028 (1988)
. . . . . 15, 16, 19, 20

Humphries v. Director, OWCP,
834 F.2d at 373 (4th Cir. 1987)
(citing Perkins v. Marine Terminals Corp.,
673 F.2d 1097 (9th Cir. 1982)
. 16

Nacirema Operating Co. v. Johnson,
396 U.S. 212 (1969)
. 12

Newport News Shipbuilding & Dry Dock Co. v. Graham,
573 F.2d 167 (4th Cir.),
cert. denied, 439 U.S. 979 (1978)
. . . . . 15, 16, 20

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977)
. . . . . 6, 11

P. C. Pfeiffer Co. v. Ford,
444 U.S. 69 (1979)
. 11

Parker v. Director, Office of Workers' Compensation Programs,
75 F.3d 929 (4th Cir. 1996)
. 2

Sea-Land Service, Inc. v. Director, OWCP,
540 F.2d 629 (3rd Cir. 1976)
. 6

Sidwell v. Express Container Services, Inc.,
71 F.3d 1134 (4th Cir. 1995)
. . . . . 6, 8, 9, 13, 16, 21

Texports Stevedore Co. v. Winchester,
632 F.2d 504 (5th Cir. 1980) (*en banc*),
cert. denied, 452 U.S. 905 (1981)
. . . . . 7, 12, 14, 15, 20

Triguero v. Consolidated Rail Corp.,
932 F.2d 95 (2nd Cir. 1991)
. . . . . 13, 15

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989)
. 11

STATUTES, RULES & REGULATIONS

33 U.S.C. § 901 *et. seq.* 5

33 U.S.C. § 903(a) . . . . . i, 5, 7, 9, 10

Rule 12.6, Rules of the
United States Supreme Court ii

CONGRESSIONAL RECORD

S. Rep. 92-1125, 92d Cong.,
2d Sess. 2 (1972)
. 11

S. Rep. 92-1125, 92d Cong.,
2d Sess. 13 (1972)
. 9

No. 95-1676

IN THE
SUPREME COURT OF THE UNITED STATES

EARL J. PARKER, JR.
and
GLENN C. REDMOND
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS;UNITED STATES DEPARTMENT OF LABOR

and

FARRELL LINES, INC.; ROYAL INSURANCE COMPANY OF AMERICA

Respondents.

BRIEF IN OPPOSITION

Respondents, Farrell Lines, Inc. and Royal Insurance Co., respectfully request that this Honorable

Court deny the petition for writ of *certiorari* which seeks review of the Fourth Circuit Court of Appeals opinion below. That opinion is reported at 75 F.3d 929 and is reprinted in the petition for *certiorari* at Appendix ("App.") A.

OPINIONS BELOW

The Opinions Below were correctly set forth in the Petition for Writ of *Certiorari.*

STATEMENT OF JURISDICTION

The Petition for Writ of *Certiorari* correctly presented the Statement of Jurisdiction.

STATUTORY PROVISIONS

The statutory provision at issue in this matter was correctly stated in the Petition for Writ of *Certiorari.*

STATEMENT OF THE CASE

The Respondent, Farrell Lines Inc. ("Farrell"), transports container cargo via ships, truck, and rail. The company leases a small location at Norfolk International Terminal ("NIT") that is used for inspection of incoming and outgoing loaded containers and minor repairs on those containers. One container repairman is assigned to the NIT facility, and others rotate to NIT as the workload demands. The job duties are similar, but not the same.

Farrell performs most of its container-repair work at its main facility located at 901 West 24th Street in Norfolk ("the 24th Street site or location"), a location approximately 5 miles from NIT. Farrell moved its facility for efficiency reasons and because the NIT location was cramped with no possibility for expansion. At the 24th Street location, empty containers, chassis, and refrigeration units are received from locations all over the United

States, repaired, and dispatched to locations throughout the United States. Repairs are made to containers owned by Farrell and other companies.

The 24th Street site is located in an area of Norfolk zoned for light industrial uses and is surrounded by a residential area to the north, a railway to the south, and a mixture of small, non-maritime businesses and professional offices in the immediate vicinity. Farrell chose the 24th Street location because of its suitability for all-weather container repair, favorable lease terms, and convenience in moving traffic and personnel between locations.

The Petitioners, Earl J. Parker ("Parker") and Glenn C. Redmon ("Redmon"), were employed by Farrell as container repairmen and inspectors. Each sustained an injury in separate incidents at Farrell's 24th Street site. After receiving compensation under the Virginia Workers' Compensation Act, each petitioner filed a separate claim

under the Longshore and Harborworkers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. § 901 *et. seq.*, seeking the greater benefits it affords.

By Decision and Order dated December 30, 1991, Administrative Law Judge Malamphy found that Farrell's 24th Street container-repair facility did not meet the situs requirements of Section 3(a) of the Act and denied Petitioners' claim for benefits. (Petitioners' App. C.) In reaching his decision, Judge Malamphy utilized the "functional relationship" test enunciated by the Ninth Circuit Court of Appeals in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).

Each petitioner individually requested review before the Benefits Review Board of the United States Department of Labor, the appropriate reviewing agency. By Order dated March 24, 1993, the cases were consolidated on appeal for purposes of decision. On

October 26, 1994, the Board affirmed the Administrative Law Judge's decision, also utilizing the "functional relationship" analysis.

Petitioners appealed to the United State Court of Appeals for the Fourth Circuit. In affirming the Board's decision, the Court relied upon its recent decision in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995)[3] In Sidwell, the Court considered the tests used by the Third ("employment nexus with maritime activity" test[4]), Fifth ("totality of the circumstances" test[5]),

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[3] Petitioners have requested that their Petition for Writ of *Certiorari* be consolidated with the Petition filed with this Court in Sidwell v. Express Container Services, Inc., No. 95-1569, for purposes of consideration by the Court.

[4] *See* Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3rd Cir. 1976). This Honorable Court has criticized the Sea-Land decision as appearing to "essentially discard [] the situs test." Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 277 n.40 (1977).

and Ninth ("functional relationship" test[6]) Circuits, but enunciated a simpler and more straight-forward situs test which is based on the plain language of the statute and examines both location and function.

REASONS TO DENY THE WRIT

I. The Fourth Circuit Court of Appeals decision that the Petitioners were not injured on a maritime situs is consistent with the guidance provided by this Honorable Court and is not, as Petitioners assert, in direct conflict with other circuits or prior decisions of the Fourth Circuit.

This Honorable Court has not specifically addressed the question of when a situs falls within an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). Such considerations are fact-specific and

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[5] *See* Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

[6] *See* Brady-Hamilton, *supra*.

are, more appropriately, addressed by lower courts. However, this Court's prior decisions offer adequate guidance to the lower courts in determining whether a particular location meets this jurisdictional situs requirement.

As the Fourth Circuit Court of Appeals correctly recognized, the issue in this case is one of statutory construction. This Court has long recognized that in such a case, the beginning point must be the language of the statute. Where a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)). The Fourth Circuit Court of Appeals adhered to

this principle of statutory construction in Sidwell[7], when enunciating its "plain language" test to determine whether a particular location qualifies as a maritime situs under Section 903(a) of the Act.

In 1972, Congress amended the Act to expand coverage to both navigable waters and "the adjoining land area." S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972). In doing so, Congress legislated a "status" requirement and a "situs" requirement, both of which must be satisfied if an injured worker is to be entitled to benefits. The situs requirement limits coverage to

> [any] injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing,

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[7] The decision from which Petitioners seek their writ of *certiorari* is based upon the holding in the Sidwell decision. Further, Petitioners have requested that this Honorable Court consolidate their Petition with the writ filed in the Sidwell case.

dismantling, or building a vessel).

33 U.S.C. § 903(a).

The plain language of the LHWCA requires that covered situses actually "adjoin" navigable waters. *Id.* Petitioners urge this Honorable Court to take an expansive view of the definitions of the word "adjoin" and of the phrase "other adjoining area" so that a maritime situs would include a location miles away from navigable waters.[8] Such broad construction is clearly contradictory to Congress' intent to expand the coverage of the Act "to

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[8] The Director, OWCP, who sided with the Petitioners before the Fourth Circuit Court of Appeals, argued, in her brief before that Court, that "other adjoining areas" should be interpreted to include areas "'near' or 'neighboring' the waterfront, or within a broadly defined 'waterfront area.'" Brief of Director, OWCP at 9. In the Sidwell case, the Director asserted, in her brief before the Fourth Circuit Court of Appeals, that a situs was covered so long as it was in "the general geographic proximity" of the waterfront. Indeed, she argued that it was "entirely reasonable" to find that all of Norfolk and Portsmouth are "adjoining areas." Brief of the Director, OWCP at 46 - 47.

cover injuries occurring in the contiguous dock area related to longshore and ship repair work." S. Rep. 92-1125, 92d Cong., 2d Sess. 2 (1972). Such sweeping definitions would also violate the rule of statutory construction whereby words must be accorded their ordinary meaning (*see* Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989)) and the traditional canon of construction, *noscitur a sociis*, which dictates that words grouped in a list should be given related meaning (*see* Beecham v. United States, 114 S. Ct. 1669, 1671 (1994); Dole v. Steelworkers, 494 U.S. 26, 36 (1990)).

Further, this Honorable Court has long acknowledged that the situs test is a geographic one (*see* Director, OWCP v. Perini North River Associates, 459 U.S. 297, 324, n.32 (1983); P. C. Pfeiffer Co. v. Ford, 444 U.S. 69, 78 - 79 (1979); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 263 - 64 (1977)) and that

there will always be a boundary to coverage which some people will cross during their employment (*see* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985); Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223 - 24 (1969)). The fact that Petitioners occasionally worked at NIT, a covered situs, does not automatically convey coverage under the Act upon them when the sustained injury occurred at a worksite remote from navigable waters.

Petitioners argue that the Fourth Circuit's "plain language" test is in direct conflict with the "functional relationship" test used in the Ninth Circuit[9], the "totality of circumstances" test used in the Fifth Circuit[10], and the

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[9] Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).

[10] Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981).

"functional" test used in the Second Circuit.[11] Each of these tests, as well as the one announced by the Fourth Circuit in Sidwell, upon which the court decided Petitioners' case, consider both the location and function of the site where the injury occurred. The Fourth Circuit test merely places a greater emphasis upon the site's proximity to navigable waters than do the tests used in other circuits. This does not, however, create such a conflict as to require the intervention of this Honorable Court.

In Brady-Hamilton, the Court identified four factors that should be considered in determining whether a location is a covered "adjoining area": (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted

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[11] Petitioners cite Triguero v. Consolidated Rail Corp., 932 F.2d 95 (2nd Cir. 1991), but concede that the Second Circuit did not delineate a specific situs test for its own use. Petition for Writ of *Certiorari* at 12.

primarily to maritime uses; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances. 568 F.2d at 141. The "plain language" test of the Fourth Circuit encompasses all but the fourth factor. The "plain language" test requires that a site "be a discrete shoreside structure or facility" (Brady-Hamilton factor three) and that it be "customarily used by the employer in loading, unloading, repairing, dismantling, or building a vessel" (Brady-Hamilton factors one and two). 71 F.3d at 1139.

The court, in Texports Stevedore, concluded that an area falls within the coverage of the LHWCA if it is "neighboring" navigable waters and if it is used customarily, although not exclusively, by employers in loading, unloading, repairing, or building a vessel. 632 F.2d at 515. The court also acknowledged that the "outer limits of the maritime area [could] not be extended to extremes." 632

F.2d at 514. It is obvious that the Fourth Circuit's "plain language" test is not in direct conflict with the Texports Stevedore test as it considers the very same location and function factors; indeed, it follows the court's admonishment that there must be an outer limit to a maritime area.

As noted in footnote 11, *supra*, the court, in Triguero, did not articulate its own test, but cited with approval those used in Brady-Hamilton, Texports Stevedore, Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), and Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978). As set forth in the preceding paragraphs, the Fourth Circuit's "plain language" test is not inconsistent with the Brady-Hamilton and Texports Stevedore tests. It also complies with the principles enunciated in Humphries and

Graham.

In an unpublished opinion, the court, in Humphries, found that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters." 834 F.2d at 373 (citing Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1101 - 02 (9th Cir. 1982). In Graham, the court found that a situs is a maritime one when it is an "integral part [] of the shipyard" despite its distance from the waterway. 573 F.2d at 169. When the Sidwell court specifically stated that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured" (71 F.3d at 1140, n.11), it implicitly affirmed its prior holdings in Humphries and Graham by acknowledging that an injury may occur some distance from the actual shoreline, yet still occur in an "other adjoining area" and, thus, upon a maritime situs.

Since the Act's inception, there has always been a limit to the areas qualifying as maritime situses. Originally, this limit was at the water's edge but, in 1972, Congress amended the Act to extend that limit to include adjoining areas. The Fourth Circuit's "plain language" test ensures coverage for all maritime employees injured in the waterfront areas where the loading, unloading, and repair of vessels occur, as Congress plainly intended.

Congress in amending the Act, created both a status and a situs requirement. By doing so, Congress acknowledged the Act could not provide coverage to all people working on the waterfront or to all maritime workers wherever their jobs might require them to work. Therefore, it is axiomatic that Congress implicitly recognized that some individuals would move in and out of coverage. Had Congress intended totally uniform coverage, as Petitioners would like this Court to believe, it

would have eliminated the situs requirement entirely. It did not do so. This Honorable Court should not, as Petitioners would have it do, extend the coverage of the Act so that entire geographical areas are included. If the coverage of the Act is to be extended, it is Congress who must do so, not the courts.

II. Assuming, *arguendo*, that a direct conflict does exist between the circuits and that a "functional" test is pronounced by the Court, Petitioners' injuries still did not occur on a maritime situs.

Even if it is determined that a direct conflict exists between the circuits, Petitioners' case is not an appropriate case for the Court to use to resolve the conflict. In announcing their decisions in Petitioners' cases, the Administrative Law Judge and the Benefits Review Board concluded, under the tests announced in Brady-Hamilton and Humphries, *supra*, that Petitioners' injuries did not

occur on a maritime situs.[12] These decisions, supported by substantial, credible evidence, provide an independent basis for the decision of the Fourth Circuit Court of Appeals. While Petitioners' would surely refute the correctness of such a decision, such a fact-bound conclusion raises no issue that warrants review by this Honorable Court.

III. There is no compelling reason to grant the writ.

Although Petitioners assert otherwise, there simply

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[12] These decisions were also based upon the holdings of Davis v. Doran Co. of California, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989) (a location on 26th Street in Norfolk was not a maritime situs where the surrounding area was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters, but because the existing structure would accommodate the movement of ship propellers in and out of the facility) and Brown v. Bath Iron Works Corp., 22 BRBS 384 (4th Cir. 1989) (a site used for a maritime purpose does not automatically bring it within the coverage of the Act; the situs inquiry looks to the relationship of the place of injury with navigable waters).

is no important federal question to be addressed in this matter. The Fourth Circuit's decision comports with decisions of this Honorable Court, with those of the other circuits, and with its own prior decisions. The Court's holding defers to the clear language of the statute. There is simply no need for this Honorable Court to expend its time defining what the statutory language makes clear.

Further, this Court has previously indicated that the question presented is not a proper matter for their consideration by denying *certiorari* in the Graham, Texports Stevedore, and Humphries cases.

Petitioners finally argue that this Honorable Court should consider this case because of the large number of longshoring cases arising in the Fourth Circuit. If there is any "broad detrimental effect which [] undermine[s] the very purpose of the Longshore Act" (Petition at 22), it is Congress, not the Court, who must address the problem.

CONCLUSION

The "plain language" test enunciated by the Fourth Circuit Court of Appeals in Sidwell and upon which the decision in this case is based adheres to the long-established principles of statutory construction and gives effect to Congress' clearly stated intent. Further, it does not contravene precedent from other federal circuits or from the Fourth Circuit itself. Petitioners' case has been properly reviewed before the Office of Administrative Law Judges, the Benefits Review Board, and the Fourth Circuit Court of Appeals. Respondent respectfully submits that the decision of the Fourth Circuit is proper and that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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